UNITED STATES COURT OF MILITARY COMMISSION REVIEW
***before* F. Williams, D. Conn, and C. Thompson**

	BRIEF OF *AMICUS CURIAE* HUMAN RIGHTS COMMITTEE OF THE AMERICAN BRANCH OF THE INTERNATIONAL LAW ASSOCIATION
	CMCR CASE NO. 09-001
UNITED STATES	Tried at Guantanamo, Cuba on 7 May 2008, 15 August 2008, 24 September 2008, 27 October - 3 November 2008
Appellee	
v.	Before a Military Commission convened by Hon. Susan Crawford
ALI HAMZA AHMAD SULIMAN AL BAHLUL	Presiding Military Judge Colonel Peter Brownback, USA (Ret.) Colonel Ronald Gregory, USAF
Appellant	
	DATE: 23 September 2009

TO THE HONORABLE, THE JUDGES OF THE COURT OF MILITARY COMMISSION REVIEW

On Behalf of *Amicus Curiae*

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Dated: 23 September 2009

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing (Brief of *Amicus Curiae* Human Rights Committee of the American Branch of the International Law Association) was sent via e-mail to CAPT Edward White on the 23rd day of September 2009, as well as to MAJ Todd E. Pierce on the 23rd day of September 2009.

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INTEREST OF *AMICUS CURIAE*

Amicus Curiae, the Human Rights Committee of the American Branch of the International Law Association, is composed of lawyers and professors of law who have practiced and/or lectured and/or published widely on these and related matters.[1] This amicus memorandum sets forth the considered views of the Committee. The Committee generally supports defendant-appellant's claim that the GTMO military commissions lack lawful jurisdiction and deny equal protection, as explained in the Summary of Argument.

SUMMARY OF ARGUMENT

The military commissions are not "regularly constituted" or "previously established in accordance with pre-existing laws" and are therefore without jurisdiction under relevant international laws. They are also not constituted within a theater of war or war-related occupied territory and are therefore without lawful jurisdiction. Additionally, they violate several multilateral and bilateral treaties (also important for our nationals abroad) that require equal protection of the law and equality of treatment more generally and are, therefore, without lawful power or authority under supreme laws of the United States. Certain persons at GTMO were transferred illegally, are therefore not properly before the commissions, and should be returned.

ARGUMENT

I. GTMO MILITARY COMMISSIONS ARE NOT "REGULARLY CONSTITUTED," ARE *ULTRA VIRES*, AND LACK JURISDICTION.

A. Requirements Recognized by the U.S. Supreme Court Are Not Met.

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[1] No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person, other than *amicus curiae*, its members, or its counsel, made a monetary contribution to the preparation or submission of this brief.

1. GTMO Military Commissions Are Not "Regularly Constituted."

In its landmark opinion in *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006), the Supreme Court ruled that "the military commission convened [under a president's order and DOD Rules of Procedure] to try Hamdan lacks power to proceed because its structure and procedures violate both the UCMJ and the Geneva Conventions." 548 U.S. at 567.

The Supreme Court ruled that common Article 3 of the Geneva Conventions "is applicable here, and ... requires that ... [a detainee] be tried by a 'regularly constituted court affording all the judicial guarantees'" recognized under customary international law and that, as Justice Stevens noted in his majority opinion, Article 14 of the International Covenant on Civil and Political Rights, 999 U.N.T.S. 171 (Dec. 9, 1966) [hereinafter ICCPR], among other instruments reflecting customary international law, sets forth "basic protections" regarding due process within common Article 3's requirements. 548 U.S. at 631-33 & n.66. Justice Stevens affirmed that "regularly constituted" courts include "'ordinary military courts' and 'definitely exclud[e] all special tribunals'" and that regularly constituted means "'established and organized in accordance with the laws and procedures already in force.'" 548 U.S. at 632. Justice Kennedy confirmed that common Article 3 applies as "binding law," that a "regularly constituted" court "relies upon ... standards deliberated upon and chosen in advance," and that a violation of common Article 3 is a war crime. 348 U.S. at 637, 642 (Kennedy, J., concurring in part). Further, "[t]he regular military courts in our system are the courts-martial" and they "provide the relevant benchmark." 348 U.S. at 644-45, also quoted in part by Justice Stevens, 548 U.S. at 632.

As the Supreme Court's opinion stressed:

> While the term "regularly constituted court" is not specifically defined in either Common Article 3 or its accompanying commentary, other sources disclose its core meaning. The commentary accompanying a provision of the Fourth Geneva Convention, for example, defines "'regularly constituted'" tribunals to include "ordinary military courts" and "definitely exclud[e] all special tribunals." GC IV COMMENTARY 340 (defining the term "properly constituted" in Article 66, which the commentary treats as identical to "regularly constituted"); *see also Yamashita*, 327 U.S., at 44 (Rutledge, J., dissenting) (describing [a] military commission as a court "specially constituted for a particular trial"). And one of the Red Cross' own treatises defines "regularly constituted court" as used in Common Article 3 to mean "established and organized in accordance with the laws and procedures already in force in a country." Int'l Comm. of Red Cross, 1 CUSTOMARY INTERNATIONAL HUMANITARIAN LAW 355 (2005); *see also* GC IV COMMENTARY 340 (observing that "ordinary military courts" will "be set up in accordance with the recognized principles governing the administration of justice").

548 U.S. at 632.

In view of these recognitions by the Supreme Court, it is simply not possible to conclude that a special military commission created *post hoc* under the Military Commissions Act [MCA], which was not "already in force" or "chosen in advance," to try merely some aliens can meet the "regularly constituted" test under common Article 3.[2]

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[2] The MCA attempted to deny certain persons the right "to invoke the Geneva Conventions as a source of rights." MCA, Section 3(a)(1), Public Law No. 109-366, 109th Cong., 2d sess., 120 Stat. 2600 (Oct. 17, 2006), codified at 10 U.S.C. § 948b(g). First, it does not limit the use of Geneva law to obviate jurisdiction or the duty of courts to apply such law as a limit of their jurisdiction. Second, it does not prohibit use of customary international law reflected in common Article 3. Third, it does not limit use of the ICCPR, the U.N. Charter, the American Declaration of the Rights and Duties of Man, the O.A.S. Charter, or the American Convention on Human Rights, as addressed below. *See also* Part II. B, *infra*. Fourth, congressional power to set up a military commission under the U.S. Constitution, Article I, § 8, cl. 10 (to try "Offences against the Law of Nations") is constitutionally limited by the law of nations and, therefore, Congress cannot move beyond the law of nations to deny Geneva-based rights while permitting prosecution of Geneva-based duties. *See, e.g.*, *Bas v. Tingy*, 4 U.S. (4 Dall.) 37, 43 (1800) (Chase, J.) ("restricted and regulated by the *jus belli*"); 11 Op. Att'y Gen. 297, 299-300 (1865); Jordan J. Paust, *In Their Own Words: Affirmations of the Founders, Framers, and Early Judiciary Concerning the Binding Nature of the Customary Law of Nations*, 14 U.C. DAVIS J. INT'L L. & POL'Y 205, 217-30 (2008). Fifth, the MCA's attempt to deny judicial use of treaty law as a source of rights before the courts and thereby control judicial decision is a violation of the separation of powers. *See, e.g.*, Jordan J. Paust, *Above the Law: Unlawful Executive Authorizations Regarding Detainee Treatment, Secret Renditions, Domestic Spying, and Claims to Unchecked Executive Power*, 2007 UTAH L. REV. 345, 412-18 (2007). Sixth, even if it did not violate the separation of powers, the MCA is trumped by rights under the Geneva Conventions under two venerable exceptions to the last-in-time rule recognized by the U.S. Supreme Court: (1) the "rights under" treaties exception, and (2) the law of war exception. *See, e.g.*, JORDAN J. PAUST, INTERNATIONAL LAW AS LAW OF THE UNITED STATES 104-07, 137-42 nn.40-49, 53-57 (2 ed. 2003); Paust, *supra*, at 379-80 & nn.91-92, 413 n.199. Cases addressing the "rights under" treaties exception

Moreover, "[i]nextricably intertwined with the question of regular constitution," the Supreme Court stressed, "is the evaluation of the procedures governing the tribunal and whether they afford 'all the judicial guarantees which are recognized as indispensable by civilized peoples.'" 548 U.S. at 633. Relevant "judicial guarantees," the Court held, "must be understood to incorporate at least the barest of those trial protections that have been recognized by customary international law [and m]any of these are described in Article 75 of Protocol I to the Geneva Conventions of 1949, adopted in 1977 (Protocol I)." 548 U.S. at 633 & n.66, also addressing Article 14 of the ICCPR in that regard. The ICCPR applies wherever the U.S. exercises

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include: *Jones v. Meehan*, 175 U.S. 1, 32 (1899); *Holden v. Joy*, 84 U.S. (17 Wall.) 211, 247 (1872); *Reichart v. Felps*, 73 U.S. (6 Wall.) 160, 165-66 (1867); *Wilson v. Wall*, 73 U.S. (6 Wall.) 83, 89 (1867); *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 631-32 (1857) (Curtis, J., dissenting); *Mitchel v. United States*, 34 U.S. (9 Pet.) 711, 749, 755 (1835); *see also Smith v. Stevens*, 77 U.S. (10 Wall.) 321, 327 (1870) (stating that a joint resolution of Congress could not relate back to give validity to a land conveyance that was void under a treaty); *Marsh v. Brooks*, 49 U.S. (8 How.) 223, 232-33 (1850) (an 1836 act of Congress could not "help the patent, it being of later date than the treaty" of 1824 which had conferred part of the title to property in others); *Chase v. United States*, 222 F. 593, 596 (8th Cir. 1915) ("Congress has no power ... to affect rights ... granted by a treaty"), *rev'd on other gds.*, 245 U.S. 89 (1917); *Elkison v. Deliesseline*, 8 F. Cas. 493, 494-96 (C.C.D.S.C. 1823) (No. 4,366) (Johnson, J., on circuit) (state law attempting to allow seizure of "free negroes and persons of color" on ships that come into its harbors directly conflicts with the "paramount and exclusive" federal commerce power, "the treaty-making power," and "laws and treaties of the United States" by "converting a right into a crime," and a plea of necessity to protect state security does not obviate the primacy of the laws and treaties of the U.S. Further, a restriction of a treaty right by legislation, "even by the general government," cannot prevail).

The second exception to the last in time rule in this case is the law of war exception, which guarantees the primacy of the laws of war over the MCA. *See, e.g.*, *Miller v. United States*, 78 U.S. (11 Wall.) 268, 315-15 (1870) (Field, J., dissenting); *Bas v. Tingy*, 4 U.S. (4 Dall.) 37, 43 (1800) (Chase, J.) ("If a general war is declared [by Congress], its extent and operations are only restricted and regulated by the *jus belli*, forming a part of the law of nations" – thus recognizing that congressional power is restricted by the laws of war); 11 Op. Att'y Gen. 297, 299-300 (1865) ("Congress cannot abrogate [the "laws of war"] ... laws of nations ... are of binding force upon the departments and citizens of the Government.... Congress cannot abrogate them or authorize their infraction. The Constitution does not permit this Government [to do so either]"); Representative Albert Gallatin, remarks, 8 ANNALS OF CONG. 1980 (1798) ("By virtue of ... [the war power], Congress could ... [act], provided it be according to the laws of nations and to treaties."), quoted in *United States ex rel. Schlueter v. Watkins*, 67 F. Supp. 556, 564 (S.D.N.Y. 1946); *see also United States v. Macintosh*, 283 U.S. 605, 622 (1931), overruled on other gds., *Girouard v. United States*, 328 U.S. 61, 69 (1945) (the war power "tolerates no qualifications or limitations, unless found in the Constitution or in applicable principles of international law"); *Tyler v. Defrees*, 78 U.S. (11 Wall.) 331, 354-55 (1871) (Field, J., dissenting).

jurisdiction or effective control over an individual.[3] Customary and treaty-based human rights reflected in the ICCPR are also those covered within the universal duty of the United States under the United Nations Charter. Article 55(c) coupled with Article 56 of the Charter mandates "universal respect for, and observance of, human rights ... for all" persons. U.N. Charter, arts. 55(c), 56. Clearly, therefore, such obligations apply at Guantanamo and within courts in the U.S.

Within the Americas (and, therefore, at GTMO and within courts in the U.S.), the American Declaration of the Rights and Duties of Man requires similarly that "[e]very person accused of an offense has the right ... to be tried by courts previously established in accordance with pre-existing laws...." American Declaration of the Rights and Duties of Man, art. XXVI (1948), O.A.S. Res. XXX (1948), O.A.S. Off. Rec. OEA/Ser. L/V/I.4, rev. (1965). The right and

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[3] *See, e.g.*, ICCPR, *supra*, art. 2(1); Advisory Opinion, Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, 2004 I.C.J. paras. 108-111 (The ICCPR "is applicable in respect of acts done by a State in the exercise of its jurisdiction outside its own territory"); Human Rights Committee, General Comment No. 31, at para. 10 (applies "to all persons subject to their jurisdiction. This means ... anyone within the power or effective control of that State party, even if not situated within the territory of the State.... [The ICCPR applies] to all individuals ... who may find themselves in the territory or subject to the jurisdiction of a State Party.... [It] also applies to those within the power or effective control of the forces of a State Party acting outside its territory, regardless of the circumstances in which such power or effective control was obtained), para. 11 ("the Covenant applies also in the situation of armed conflict to which the rules of international humanitarian law are applicable."), U.N. Doc. CCPR/C/21/Rev.1/Add.13 (2004); H.R. Comm., General Comment No. 24, at paras. 4, 12 ("all those under a State party's jurisdiction"), U.N. Doc. CCPR/C/21/Rev.1/Add.6 (1994); Coard, *et al.* v. United States, Case No. 10.951, Report No. 109/99, Annual Report of the Inter-Am. Comm. H.R. (Sept. 29, 1999); Alejandre, *et al.* v. Cuba, Case No. 11.589, Annual Report of the Inter-Am. Comm. H.R. (Sept. 29, 1999); Human Rights Comm., Concluding Observations on Croatia, 28/12/92, U.N. Doc. CCPR/C/79/Add.15 (1992), § 9; Leila Zerrougui, *et al.*, Report, *Situation of Detainees at Guantanamo Bay*, Commission on Human Rights, 62nd sess., items 10 and 11 of the provisional agenda, U.N. Doc. E/CN.4/2006/120 (Feb. 15, 2006), at 8-9, para. 11; Jordan J. Paust, *Executive Plans and Authorizations to Violate International Law Concerning Treatment and Interrogation of Detainees*, 43 COLUMBIA J. TRANSNAT'L L. 811, 822 n.40 (2005) [hereinafter Paust, *Executive Plans*]. More specifically, there is no territorial limitation set forth with respect to the absolute rights and duties contained in Article 14 of the ICCPR. The authoritative decisions and patterns of *opinio juris* noted above are part of subsequent practice and expectation relevant to proper interpretation of the treaty. *See* Vienna Convention on the Law of Treaties, art. 31(3)(b), 1155 U.N.T.S. 331 (1969) [hereinafter Vienna Convention]. Treaties must also be interpreted in light of their object and purpose (*see, e.g., id.* art. 31(1)), which in this instance is to assure universal respect for and observance of the human rights set forth in the treaty. *See* ICCPR, *supra*, preamble (recognizing "equal and inalienable rights of all," recognizing that "everyone ... [should] enjoy" human rights, and "[c]onsidering the obligation of States under the Charter of the United Nations to promote universal respect for, and observance of, human rights").

concomitant duty reflected in Article XXVI is binding on the United States through the Charter of the Organization of American States.[4] Quite clearly, GTMO military commissions created *post hoc* under the 2006 MCA cannot meet the requirement of having been "previously established in accordance with pre-existing laws."

2. GTMO Commissions Lack Jurisdictional Competence.

With respect to limitations on power to create a military commission and lack of jurisdictional competence, the Supreme Court recognized that "four preconditions [exist] for exercise of jurisdiction" by a law of war military commission, including:

> First, "[a] military commission, (except where otherwise authorized by statute), can legally assume jurisdiction only of offenses committed within the field of the command of the convening commander." The "field of command" in these circumstances means the "theatre of war." Second, the offense charged "must have been committed within the period of the war." No jurisdiction exists to try offenses "committed either before or after the war."....

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[4] *See, e.g.*, Charter of the O.A.S., art. 3(k) [*see also id.* arts. 44(a), 111], 21 U.S.T. 607, T.I.A.S. 6847 (1948); Advisory Opinion OC-10/89, I-A, Inter-Am. Court H.R., Ser. A: Judgments and Opinions, No. 10, paras. 45, 47 (1989); Inter-Am. Comm. H.R., Report on the Situation of the Inhabitants of the Interior of Ecuador Affected by Development Activities, Chapter VIII (1996), OEA/Ser.L/V/II.96, doc. 10 rev. 1 (Apr. 24, 1977) ("The American Declaration ... continues to serve as a source of international obligation for all member states"); The "Baby Boy" Opinion, Case 2141, Inter-Am. Comm. H.R. 25, OEA/Ser.L/V/II.54, doc. 9 rev. 1 (1981), at para. 15 ("As a consequence of Article 3j, 16, 51e, 112 and 150 of [the Charter], the provisions of other instruments and resolutions of the OAS on human rights acquired binding force. Those instruments and resolutions of the OAS on human rights approved with the vote of the U.S. Government" include the American Declaration of the Rights and Duties of Man. That Declaration affirms several human rights, now protected through the O.A.S. Charter, including the right to "resort to the courts to ensure respect for ... [one's] legal rights" documented in Article XVIII); Roach Case, No. 9647, Inter-Am. Comm. H.R. 147, OEA/Ser.L/V/II.71, doc. 9 rev. 1 (1987), at para. 48; *see also* RICHARD B. LILLICH & HURST HANNUM, INTERNATIONAL HUMAN RIGHTS 802-04 (3 ed. 1995); DAVID WEISSBRODT, JOAN FITZPATRICK, FRANK NEWMAN, INTERNATIONAL HUMAN RIGHTS 598-600 (3 ed. 1996); MYRES S. MCDOUGAL, HAROLD D. LASSWELL, LUNG-CHU CHEN, HUMAN RIGHTS AND WORLD PUBLIC ORDER 198, 316 (1980).

Within the Americas, the United States is also bound to take no action inconsistent with the object and purpose of the American Convention on Human Rights, 1144 U.N.T.S. 123 (1969), which would necessarily include the obligation in Article 8(1) to provide every person accused of a crime the right to trial before "a competent, independent, and impartial tribunal, previously established by law...." This obligation arises because the U.S. has singed the treaty while awaiting ratification. *See, e.g.*, Vienna Convention, *supra* note 3, art. 18.

548 U.S. at 597. The Court noted that "Hamdan's tribunal was appointed not by a military commander in the field of battle, but by a retired major general stationed away from any active hostilities." 548 U.S. at 611. As noted in Part I. B. below, GTMO military commissions cannot comply with the additional requirement that a military commission be created in the "theatre of war" or in a war-related occupied territory.

B. Further Supreme Court Recognition of Limitations With Respect to Place.

The Supreme Court has recognized another limitation on the power to set up a military commission and its jurisdictional competence, *i.e.*, that lawful power and competence apply only during an actual war (to which the laws of war apply) and within a war zone (*i.e.*, within an actual theater of war such as Afghanistan or a war-related occupied territory). *See, e.g.*, *The Grapeshot*, 76 U.S. 129, 132-33 (1869) (jurisdiction exists "wherever the insurgent power was overthrown"); WILLIAM WINTHROP, MILITARY LAW AND PRECEDENTS 836 (2 ed. 1920); Jordan J. Paust, *Antiterrorism Military Commissions: Courting Illegality*, 23 MICH. J. INT'L L. 1, 5 & n.14, 25 n.70, 26-27 (2001) [hereinafter Paust, *Military Commissions*]; *see also Madsen v. Kinsella*, 343 U.S. 341, 346-48 (1952) (military commissions are "war courts," "related to war," and are proper in a war-related occupied enemy territory "in time of war"); *Duncan v. Kahanamoku*, 327 U.S. 304, 324 (1946) (jurisdiction exists in "occupied enemy territory"); *id.* at 326 (Murphy, J., concurring) (jurisdiction exists "[o]nly when a foreign invasion or civil war actually closes the courts"); *In re Yamashita*, 327 U.S. 1, 11, 20 n.7 (1946) (a military commission is a "war court" prosecuting the "law of war" and in that instance was created by a military commander in charge of the U.S. Army Forces, Western Pacific, theater of war and war-related occupied territory "so long as a state of war exists." *Id.* at 9-12); *Coleman v. Tennessee*,

97 U.S. 509, 515 (1878) ("when ... in the enemy's country"); *id.* at 517 (when occupation of enemy territory occurs).

As Colonel Winthrop recognized in his classic study of military law: "A military commission ... can legally assume jurisdiction only of offences committed within the field of command of the convening commander," and regarding military occupation, "cannot take cognizance of an offence committed without such territory.... The place must be the theater of war or a place where military government or martial law may be legally exercised; otherwise a military commission ... will have no jurisdiction...." WINTHROP, *supra*, at 836. The military commission set up within the United States during World War II and recognized in *Ex parte Quirin* had been created during war in what was then an actual theater of war for prosecution of enemy belligerents for violations of the laws of war that occurred within the United States (in Florida and New York) and within the convening authority's field of military command – the Eastern Defense Command of the United States Army. 317 U.S. 1, 22 n.1 (1942).

What is unavoidably problematic with respect to military commission jurisdiction at Guantanamo, Cuba is the fact that the U.S. military base at Guantanamo is neither in an actual theater of war nor in a war-related occupied territory. *See, e.g.*, WINTHROP, *supra*, at 836; Paust, *Military Commissions*, *supra*, at 25 n.70. *See also Rasul v. Bush*, 542 U.S. 466, 487 (2004) (Kennedy, J., concurring) (correctly describing Guantanamo as territory "far removed from any hostilities" and clearly not in an actual theater of war). Consequently, a military commission at Guantanamo is not properly constituted and is without lawful jurisdiction. Also, alleged violations of the laws of war by detainees during a war in Afghanistan clearly did not occur in Cuba or within the field of command of the convening commander.

An additional problem is that the GTMO military commissions are not limited to prosecutions of war crimes. For example, "conspiracy" is chargeable under the MCA, but conspiracy as such is not a violation of the laws of war. The Supreme Court recognized in *Hamdan* that a regularly constituted law of war military commission can be used only to prosecute violations of the laws of war and that conspiracy as such has not been recognizably covered. 548 U.S. at 598-613. See also *The Prosecutor v. Milan Milutinov*, Case No. IT-99-37-AR72, para. 26 (ICTY, 21 May 2003). Other crimes chargeable under the MCA that are not war crimes include (1) the crime of "providing material support for terrorism" unless the perpetrator is actually abetting a war crime of terrorism, and (2) the crime of "wrongfully aiding the enemy," which is merely a type of crime against the state or pure political offense that can rightly reach only those who owe allegiance to the U.S.

II. GTMO MILITARY COMMISSIONS VIOLATE TREATIES REQUIRING EQUAL PROTECTION.

A. Multilateral Treaties.

Under the MCA, there is unavoidable per se discrimination on the basis of national origin, denial of equality of treatment and equal protection of the law, and denial of justice to aliens. Under Section 3(a)(1), only an "alien unlawful enemy combatant is subject to trial by military commission." Several relevant treaty-based and customary international laws are therefore necessarily violated.

For example, U.S. military commissions must comply with Article 14 of the International Covenant on Civil and Political Rights which applies either through common Article 3 of the

1949 Geneva Conventions[5] or directly as independent treaty law of the United States.[6] Article 14 of the ICCPR reflects a minimum set of customary and treaty-based human rights to due process guaranteed to all persons in all circumstances by customary international law reflected therein,[7] and also by and through Articles 55(c) and 56 of the United Nations Charter.[8] These rights include those encompassed within the mandate that "[a]ll persons shall be equal before the courts and tribunals" and the express right of all persons "in full equality" to "a fair and public hearing by a competent, independent and impartial tribunal established by law." ICCPR, art. 14(1) and (3). The ICCPR also requires that all persons subject to a state's jurisdiction be free from a "distinction of any kind, such as ... national or social origin" (*Id.* art. 2(1)) and mandates that "[a]ll persons are equal before the law and are entitled without any discrimination to the equal

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[5] Article 3 incorporates by express reference all due process guarantees recognized under customary international law. Concerning incorporation of customary law reflected in Article 14 of the ICCPR by reference in Article 3, *see, e.g.*, *Hamdan*, 548 U.S. at 633 & n.66; Paust, *Military Commissions*, *supra*, at 7 n.15, 12 n.26.

[6] When it ratified the International Covenant, the United States placed a declaration in its instrument of ratification that attempted to function as a declaration of partial (not full or general) non-self-execution for a very limited purpose. The declaration expressly did not apply to Article 50 of the ICCPR, which requires that all of the provisions of the treaty apply within the U.S. (and, therefore, in any tribunal in the U.S.) "without any limitations or exceptions." Further, the Executive Explanation assured that the intent was merely to clarify that the treaty itself "will not create a private cause of action in U.S. courts." See U.S. Reservations, Understandings, and Declarations Concerning the 1966 Covenant on Civil and Political Rights, U.S. Senate Executive Report 102-23, 102d Cong. 2d Sess. (1992); JORDAN J. PAUST, JON M. VAN DYKE, LINDA A. MALONE, INTERNATIONAL LAW AND LITIGATION IN THE U.S. 85-87, 262, 265-66 (2 ed. 2005, West Pub., American Casebook Series); PAUST, *supra* note 2, at 361-62. Therefore, the declaration does not limit the reach of Article 50 or the use of the due process and equal protection provisions defensively in a criminal proceeding. *See, e.g.*, PAUST, VAN DYKE, MALONE, *supra*, at 85-87, and references cited; Ruth Wedgwood, remarks, 85 PROC., AM. SOC. INT'L L. 139, 141 (1991); *United States v. Duarte-Acero*, 208 F.3d 1282, 1284 (11th Cir. 2000) (despite the declaration, the ICCPR is supreme law of the land); *id.*, 132 F. Supp.2d 1036, 1040 n.8 (S.D. Fla. 2001) (the declaration does not apply when raising "ICCPR claims defensively"). Additionally, the declaration is not relevant to the universal reach of customary human rights to due process (now reflected in Article 14 of the ICCPR), customary prohibitions of "denial of justice" to aliens, or customary human rights norms *jus cogens*.

[7] *See, e.g.*, *Hamdan*, 548 U.S. at 631-33 & n.66; Paust, *Military Commissions*, *supra*, at 12 & n.26.

[8] On the universal reach of the U.N. Charter's obligations, *see, e.g.*, Part I. A. 1, *supra*.

protection of the law"[9] and, especially, that "the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as ... national or social origin." *Id.* art. 26. GTMO military commissions under the MCA, which are expressly designed merely for prosecution of certain aliens, unavoidably involve national or social origin discrimination[10] and a denial of equal protection of the law in violation of customary and treaty-based human rights law.

The American Declaration of the Rights and Duties of Man reflects the same type of individual rights and they are binding within this hemisphere on all parties to the O.A.S. Charter. See *supra* note 4. Article II of the Declaration affirms that "[a]ll persons are equal before the law and have the rights and duties established in this Declaration." Article XXVI recognizes that "[e]very person accused of an offense has the right ... to be tried by courts previously established in accordance with pre-existing laws...." Article 1 of the American Convention on Human Rights affirms that "all persons subject to ... [the] jurisdiction" of a party shall have "the free and full exercise of" rights reflected in the Convention "without any distinction for reasons of ...

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[9] ICCPR, *supra*, art. 26; *see also id.* art. 14(1), (3); Universal Declaration of Human Rights, arts. 2, 7, U.N. G.A. Res. 217A, 3 U.N. GAOR, U.N. Doc. A/810, at 71 (1948). On the nature of the Universal Declaration as (1) customary international law, and (2) an authoritative aid for interpretation of human rights protected by and through the U.N. Charter, *see, e.g.*, MCDOUGAL, LASSWELL, CHEN, *supra* note 4, at 272-74, 302, 325-30; PAUST, *supra* note 2, at 181, 191, 198-200, 228 n.182, 246 n.372, 256 n.468, 286 n.595, 436-37 n.48; *Filartiga v. Pena-Irala*, 630 F.2d 876, 882 (2d Cir. 1980); *Rodriguez Fernandez v. Wilkinson*, 505 F. Supp. 787, 796-97 (D. Kan. 1980); U.S. Memorial before the International Court of Justice in Case Concerning United States Diplomatic Staff in Tehran (United States v. Iran), 1980 I.C.J. Pleadings; Memorandum for the United States as *Amicus Curiae*, Filartiga v. Pena-Irala, 630 F. 2d 876 (2d Cir. 1980), at 9, reprinted in 19 I.L.M. 585, 593 (1980).

[10] On the prohibition of national or social origin discrimination, *see, e.g.*, ICCPR, *supra*, arts. 2, 26; Universal Declaration of Human Rights, *supra* note 9, arts. 2, 7; Advisory Opinion on the Legal Consequences for States of the Continued Presence of South Africa in Namibia, 1971 I.C.J. 16, 57, para. 131 ("To establish..., and to enforce, distinctions, exclusions, restrictions, and limitations exclusively based on grounds of ... national ... origin which constitute a denial of fundamental human rights is a flagrant violation of the ... [U.N.] Charter."). The same human rights provisions prohibit discrimination on the basis of "status," which should cover, for example, discrimination on the basis of military or nonmilitary status.

national or social origin." Article 24 affirms: "All persons are equal before the law. Consequently, they are entitled, without discrimination, to equal protection of the law."

These treaty-based requirements of equal protection and due process can also inform the meaning of Fifth Amendment requirements that govern appellate proceedings in the U.S. and trials at GTMO in territory under special U.S. control. *See generally Boumediene v. Bush*, 128 S. Ct. 2229, 2240, 2253-58 (2008). *See also United States v. Verdugo-Urquidez*, 494 U.S. 259, 265-66 (1990) (rationale recognized that 4th Amendment is different from the 5th and 6th, which on their face can reach aliens abroad); *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 668 n.5 (1974); *Balzac v. Porto Rico*, 258 U.S. 298, 312 (1922); *Downes v. Bidwell*, 182 U.S. 244, 381-82, 385 (1901) (Harlan, J., dissenting); *United States v. Tiede*, 86 F.R.D. 227, 242, 244 (U.S. Ct. for Berlin 1979); Jordan J. Paust, Boumediene *and Fundamental Principles of Constitutional Power*, 21 REGENT U. L. REV. 351, 353-56 (2009).

B. Bilateral Treaties.

Additionally, bilateral friendship, commerce, and navigation treaties often require access to courts and equality of treatment. *See, e.g.*, RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES §713 (2) and cmnt. h and reporters' note 3 (1987); Wilson, *Access-to-Courts Provisions in United States Commercial Treaties*, 47 AM. J. INT'L L. 20 (1953); *Asakura v. City of Seattle*, 265 U.S. 332, 340-41 (1924). That is the case here with respect to a national of Yemen and would also be the case regarding nationals of Pakistan[11] and

[11] *See* Treaty of Friendship and Commerce between the United States of America and Pakistan, art. I, signed at Washington, Nov. 12, 1959, entered into force Feb. 12, 1961, 12 U.S.T. 110; T.I.A.S. 4683; 404 U.N.T.S. 259; see also *id.*, art. V.

Saudi Arabia.[12] With respect to nationals of Yemen, see Agreement Relating to Friendship and Commerce, Exchange of notes at Sanaa May 4, 1946; entered into force May 4, 1946, 60 Stat. 1782; T.I.A.S. 1535; 1946 U.S.T. Lexis 407; 12 Bevans 1223; 4 U.N.T.S. 165. Article III requires:

> Subjects of His Majesty the King of the Yemen in the United States of America and nationals of the United States of America in the Kingdom of the Yemen shall be received and treated in accordance with the requirements and practices of generally recognized international law. In respect of their persons, possessions and rights, such subjects or nationals shall enjoy the fullest protection of the laws and authorities of the country, and shall not be treated in any manner less favorable than the nationals of any third country....

The MCA did not mention this treaty and under venerable and binding Supreme Court decisions the last in time rule will not apply unless there is a clear and unequivocal expression of intent to override a treaty. *See, e.g., Weinberger v. Rossi*, 456 U.S. 25, 35 (1982); *Cook v. United States*, 288 U.S. 102, 120 (1933); *United States v. Lee Yen Tai*, 185 U.S. 213, 221 (1902); PAUST, *supra* note 2, at 99, 101, 120, 125 n.3 (citing other cases). Even if such had occurred, the rights under treaties exception would apply. *See supra* note 2.

III. CERTAIN PERSONS BEFORE THE COMMISSIONS MUST BE RETURNED.

Another jurisdictional problem with respect to prosecution of certain persons in a military commission at Guantanamo involves an absolute prohibition under the laws of war. Any person who is not a prisoner of war in Afghanistan cannot be lawfully transferred out of occupied territory. The Geneva Convention Relative to the Protection of Civilian Persons in Time of War,

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[12] With respect to nationals of Saudi Arbabia, *see* Provisional Agreement in Regard to Diplomatic and Consular Representation, Juridical Protection, Commerce, and Navigation between the United States and Saudi Arabia (3 Nov. 1933), art. II, 142 L.N.T.S. 329, 48 Stat. 1826, 1933 U.S.T. Lexis 55.

Aug. 12, 1949, art. 49, 75 U.N.T.S. 287, 6 U.S.T. 2516 [hereinafter GC][13] expressly mandates that "[i]ndividual ... forcible transfers ... of protected persons from occupied territory ... are prohibited, regardless of their motive." GC, *supra*, art. 49.[14] Further, "unlawful deportation or transfer" is not merely a war crime; it is also a "grave breach" of the Convention. GC, *supra*, art. 147; GC IV COMMENTARY, *supra*, at 280, 599. *See also* Geneva Protocol I, *supra* note 14, art.

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[13] The Geneva Conventions apply to the wars in Afghanistan and Iraq even though the U.S. cannot be at "war" with al Qaeda as such. Importantly, a member of al Qaeda, like *any* person in the war area, is covered and has duties under certain provisions of the Geneva Civilian Convention if captured during war in Afghanistan or Iraq. *See, e.g., Hamdan*, 344 F. Supp.2d 152, 160-64 (D.D.C. 2004); Paust, *Military Commissions*, *supra*, at 5-8 n.16; Paust, *Executive Plans*, *supra* note 3, at 816-20, 829-30; Jordan J. Paust, *War and Enemy Status After 9/11: Attacks on the Laws of War*, 28 YALE J. INT'L L. 325, 325-28 (2003).

[14] *See also* GC, *supra*, art. 76 ("persons accused of offences shall be detained in the occupied country"); Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, art. 85(4)(a), 1125 U.N.T.S. 3 [hereinafter Geneva Protocol I]; IV COMMENTARY, GENEVA CONVENTION RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR 278-80, 363 (ICRC, Jean S. Pictet ed. 1958) [hereinafter GC IV COMMENTARY]; UK, THE MANUAL OF THE LAW OF ARMED CONFLICT 293 (2004) ("forbidden to transfer ... not moved outside occupied territory"); Paust, *Executive Plans*, *supra* note 3, at 850-51; Paust, *Military Commissions*, *supra*, at 24 n.68. Additionally, rights and duties under the Geneva Conventions must be applied "in all circumstances." *See, e.g.*, GC, *supra*, arts. 1, 3, 27; Paust, *Executive Plans*, *supra* note 3, at 814-16. Importantly, any detainee who is not a prisoner of war has certain protections under the Geneva Civilian Convention and common Article 3, which now applies in an international armed conflict (*i.e.*, there are no gaps in Geneva law that leave a person without any protections). *See, e.g.*, GC, *supra*, arts. 3, 5, 13, 16, 27-33; U.S. Dep't of Army Field Manual 27-10, THE LAW OF LAND WARFARE 31, para. 73, 98, para. 247(b) (1956); GC IV COMMENTARY, *supra*, at 14, 51, 58, 595; III COMMENTARY, GENEVA CONVENTION RELATIVE TO THE TREATMENT OF PRISONERS OF WAR 51 n.1, 76, 423 (ICRC, Jean S. Pictet ed. 1960); UK, THE MANUAL OF THE LAW OF ARMED CONFLICT, *supra*, at 145, 148, 150, 216, 225; Derek Jinks, *Protective Parity and the Law of War*, 79 NOTRE DAME L. REV. 1493, 1504, 1510-11 (2004); Paust, *Executive Plans*, *supra* note 3, at 817-18, and references cited; Paust, *Military Commissions*, *supra*, at 6-8 n.15; Marco Sassoli, *"Unlawful Combatants": The Law and Whether It Needs to Be Revised*, 97 PROC., AM. SOC'Y INT'L L. 196, 197 (2003); William H. Taft, IV, *The Law of Armed Conflict After 9/11: Some Salient Features*, 28 YALE J. INT'L L. 319, 321-22 (2003); *The Prosecutor v. Delalic*, Case No. IT-96-21-T (Trial Chamber, ICTY, 16 Nov. 1998), at para. 271 ("there is no gap between the Third and the Fourth Geneva Conventions"); *Hamdan*, 344 F. Supp.2d at 161, 163. Even nationals of a neutral state are protected while they are outside "the territory of" the detaining state (*e.g.*, while outside the U.S.) and they are, therefore, not within any exclusion in GC Article 4. *See, e.g.*, GC, *supra*, art. 4 (neutral nationals are excluded from Part III only when they are "in the territory of" the detaining state); GC IV COMMENTARY, *supra*, at 48; UK, THE MANUAL OF THE LAW OF ARMED CONFLICT, *supra*, at 274; U.S. Dep't of Army, Pam. 27-161-2, II INTERNATIONAL LAW 132 (1962); Paust, *Executive Plans*, *supra* note 3, at 819 & n.28, 850-51 (also demonstrating that there is no distinction between persons lawfully or unlawfully within territory).

That the U.S. has been an occupying power in Afghanistan and Iraq is well-known. *See, e.g.*, U.N. S.C. Res. 1438, U.N. SCOR, 58th Sess., 4761st mtg. pmbl., U.N. Doc. S/RES/1483 (2003) (addressing U.K. and U.S. recognitions); Jordan J. Paust, *The U.S. as Occupying Power Over Portions of Iraq and Special Responsibilities Under the Laws of War* (May 2003), *available at* http://www.nimj.org/documents/occupation(1).doc; Paust, *Military Commissions*, *supra*, at 24 n.67.

85(4)(a). Such a crime obviates the jurisdictional competence of a GTMO military commission. Moreover, to correct such violations, persons who are not prisoners of war and who were captured or controlled in occupied territory and eventually found at Guantanamo should be returned to the territory where they were captured. Continued detention or a trial at Guantanamo would continue the crime.

IV. CONCLUSION.

For the foregoing reasons, the GTMO commissions are not "regularly constituted" or "previously established in accordance with pre-existing laws" and are therefore without jurisdiction under relevant international laws. They are also not constituted within a theater of war or war-related occupied territory and are therefore without lawful jurisdiction. Additionally, they violate several multilateral and bilateral treaties that require equal protection of the law and equality of treatment more generally and are, therefore, without lawful power or authority under supreme laws of the United States. Certain persons at GTMO were also transferred illegally, are therefore not properly before the commissions, and should be returned.

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